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December 14, 2011

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: ***Canexus Chemicals Canada L.P. v. BNSF Railway Company,***
STB Docket No. 42132

Dear Ms. Brown:

Enclosed for filing in the above-captioned matter is the public version of BNSF Railway Company's Motion to Permit Consideration of 2011 TIH Movements from BNSF Traffic Data in Selecting Comparison Group ("BNSF's Motion"). We have redacted highly confidential information from the motion and the Verified Statement of Benton V. Fisher of FTI Consulting, Inc., including waybill sample data and other highly confidential information. We are filing under separate cover the highly confidential version of BNSF's Motion, the Verified Statement of Benton V. Fisher, and a CD that contains electronic work papers of Mr. Fisher.

If you have any questions, please do not hesitate to contact me.

Regards,



Linda S. Stein

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cc: Counsel of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**CANEXUS CHEMICALS
CANADA L.P.**

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant.

STB Docket No. 42132

**BNSF'S MOTION TO PERMIT CONSIDERATION
OF 2011 TIH MOVEMENTS FROM BNSF
TRAFFIC DATA IN SELECTING COMPARISON GROUP**

Defendant BNSF Railway Company ("BNSF") hereby requests the STB to permit the parties to select comparable movements in this Three Benchmark case from BNSF's 2011 traffic tapes. The Board has stated that where "there are insufficient comparable movements in the Waybill Sample, we will entertain a reasonably tailored request for comparable movements from the defendant's own traffic tapes."¹ As explained below and in the accompanying verified statement of Benton Fisher, Senior Managing Director of FTI Consulting, there are insufficient comparable movements in the most recently available Waybill Sample data (2009) so the Board should allow the parties to select comparable traffic from a reasonably tailored set of BNSF's 2011 traffic data.

As the complainant Canexus Chemicals Canada, L.P. ("Canexus") acknowledged in its complaint, BNSF's pricing of chlorine movements underwent a fundamental change on March

¹ *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 83 (STB served Sept. 5, 2007) (hereafter "*Simplified Standards*").

16, 2011. Complaint at ¶ 8. That price change was not limited to the specific movements at issue here. BNSF's marketing personnel in its Industrial Products group fundamentally changed the level and structure of BNSF's rates applicable to all chlorine and other toxic-by-inhalation ("TIH") movements managed by the Industrial Products group, both local and interline.² As explained by Mr. David Garin, BNSF's Group Vice President for Industrial Products Marketing, this pricing change was not driven by inflationary cost increases but rather was intended to bring BNSF's rates up to market levels in light of the major changes in the transportation market for TIH products in the preceding two years. As a result of BNSF's TIH price increases, a comparison of the current R/VC ratios on the issue traffic to R/VC ratios on traffic for the same or similar movements in the pre-2011 Waybill Sample data will not produce a meaningful answer to the key question in a Three-Benchmark case: whether the issue traffic rates are yielding contribution to joint and common costs similar to the contribution from rates currently charged on comparable traffic. Supplementation of the waybill data is appropriate because there are *no* comparable movements in the 2009 waybill data given the fundamental change in TIH pricing that BNSF's Industrial Products group instituted in March of 2011.

Moreover, the movements at issue here involve some of the longest movements of chlorine – or for that matter, any TIH product – in the United States. In *Simplified Standards* and the Three-Benchmark cases, the Board has made it clear that distance is a critical factor in determining whether movements are comparable. The Board also has acknowledged in *Ex Parte No. 385 (Sub-No. 7)* that there must be adequate data on comparable traffic for the Three-Benchmark test to be valid. However, as explained by Mr. Fisher, BNSF's 2009 waybill sample contains a total of only { } within a broad distance range that is within

² Anhydrous ammonia is marketed by BNSF's Agricultural Products Marketing group.

500 miles of the Albuquerque issue traffic movement and { } within 500 miles of the Glendale issue traffic movement. The 500 mile mileage band is much broader than ever accepted in a Three-Benchmark case. Even if movements of other TIH commodities are considered comparable to movements of chlorine, which would not necessarily be appropriate given differences in demand elasticity of the different TIH shippers, the total number of local other TIH movements in the 2009 Waybill Sample within 500 miles of either issue traffic destination would only be { }, a total that is clearly insufficient to carry out a Three-Benchmark analysis. Further, even if comparable movements data from the 2006-2008 Waybill Sample were included, the increase in the number of potentially comparable movements would be very modest, only { } and { } within 500 miles of either issue traffic destination. In contrast, the post-March 15, 2011 BNSF traffic data include over { } BNSF local movements of chlorine that were transported within 500 miles of either issue traffic destination.

Finally, the Board's standard for supplementing the Waybill Sample is met because BNSF's request is reasonably tailored. BNSF proposes to produce to Canexus its available traffic records for the year 2011 through the third quarter for all TIH movements. In addition, BNSF will provide traffic records that BNSF's consultants have costed, although Canexus would be free to question BNSF's cost calculations if it saw fit. BNSF will be prepared to produce the traffic data promptly, within 3 days of a Board order permitting the use of the 2011 traffic data subject to an appropriate protective order, so that the schedule for this Three-Benchmark case will not be delayed.

I. Legal Standard

Canexus filed this case seeking a determination that common carrier rates assessed by BNSF for certain long-haul movements of chlorine on or after March 16, 2011 are unreasonably high under the Three-Benchmark methodology established by the Board in *Simplified Standards*. Complaint at ¶¶ 18, 20. In establishing those simplified standards, the Board explained that it was “seek[ing] to make its rail rate dispute resolution procedures more affordable and accessible to shippers of small and medium-sized shipments, while simultaneously ensuring that the new guidelines do not result in arbitrary ratemaking.”³

Under the simplified approach adopted in the Three-Benchmark methodology, the Board determines whether the level of contribution from the issue traffic to the defendant’s fixed costs (as reflected in the R/VC ratio) is comparable to the contribution level of other shippers with similar demand characteristics.⁴ If the mark-up over variable costs of the issue traffic is comparable to the mark-up over variable costs of other comparable movements, the challenged rate is deemed to be reasonable. The fundamental objective in a Three-Benchmark case is to determine whether the issue traffic has been singled out to make greater contribution to joint and common costs than other comparable traffic.⁵ As the Board explained, “[t]he whole purpose of the Three-Benchmark approach is to determine where the challenged rate falls in comparison to other similarly situated traffic.”⁶

³ *Simplified Standards*, at 4.

⁴ *See, e.g., id.* at 73.

⁵ *Id.* at 17.

⁶ *Id.* at 80.

Moreover, the Board has recognized that the rate comparison must focus on *current* rates. As the Board recently explained, under the Three-Benchmark methodology, “a rate is set based on rates that are *currently* charged to other similar traffic.”⁷ The vintage of the rates to which the issue traffic is compared can be critical to the accuracy of any test to determine whether the issue traffic is being singled out for unfair treatment. If a fundamental change has occurred over time in the pricing of particular movements, the comparison of a current issue traffic rate to older rates may produce the false appearance that the issue traffic is being treated differently from other “similarly situated” traffic. The United States Court of Appeals for the District of Columbia Circuit acknowledged that the use of “older data increases the ‘likelihood of distorted comparisons and results.’”⁸

The standard procedure in a Three-Benchmark case is for the parties to choose comparable traffic from the Waybill Sample data, which will necessarily contain movement data relating to an historical period. The Board has recognized that the “regulatory lag” between the data available to use in choosing comparable movements in a Three-Benchmark case and the current issue traffic rates could become an issue in a particular case. However, the Board has concluded that in most cases, the regulatory lag will not produce unacceptably arbitrary results, because “the effects of price shifts associated with an inflationary increase in costs should be

⁷ *Arizona Elec. Power Coop., Inc. v. BNSF Ry. Co. & Union Pac. R.R. Co.*, STB Docket 42113, at 33 (STB served Nov. 22, 2011) (emphasis in original).

⁸ *CSX Transp., Inc. v. STB*, 584 F.3d 1076, 1083 (D.C. Cir. 2009) (quoting petitioners). In that decision, which remanded *Simplified Standards* to the Board, the court vacated its prior ruling that the Board had adequately dealt with the regulatory lag issue in the original rulemaking decision. Therefore, the validity of the Board’s treatment of regulatory lag remains an open issue. However, that issue need not be addressed here because BNSF is seeking permission to use the 2011 traffic data based on other language in the Board’s decision permitting the use of data other than Waybill Sample data in cases where the Waybill Sample data do not provide sufficient comparable movements to carry out a valid Three-Benchmark comparison.

largely offset, leaving the R/VC ratios unaffected.”⁹ But the flip side of that observation is also true – when price changes are not associated with inflationary increases in costs, then a comparison of current rates with older rates is likely to produce arbitrary and meaningless results. Under those circumstances, a comparison of current issue traffic rates to rates on older movements in the Waybill Sample might indicate that issue traffic rates are out-of-line with current comparable traffic rates or it might indicate only that prices have changed over time – which is not a factor relevant to assessing the reasonableness of rates. In other words, such a comparison would produce indeterminate and, thus, totally arbitrary results.

Finally, while the Board has repeatedly emphasized the need for simplicity in a Three-Benchmark case, it has also acknowledged that adequate data on comparable traffic must be available for the results of the test to be rational. In *Waybill Data Reporting for Toxic Inhalation Hazards*, STB Ex Parte No. 385 (Sub-No.7) (STB served Jan. 28, 2010) (“*TIH Waybill Data*”) the Board recognized that the relative scarcity of data relating to TIH movements in a Waybill Sample could justify expanding the reporting of TIH movements for the Waybill Sample. As the Board explained, by expanding the data on TIH available to parties in selecting comparable traffic, “the parties could construct comparison groups that would be more comparable to the issue traffic.” *TIH Waybill Data*, slip op. at 2.

Indeed, even before its experience in recent cases involving TIH movements, where the Board was concerned about the size of the universe of relevant data, the Board recognized that there might be situations where the Waybill Sample data would not provide sufficient data to produce a credible assessment of the current rates for traffic comparable to the issue traffic. As the STB explained in *Simplified Standards*, “[t]his Three-Benchmark approach rests on the

⁹ *Simplified Standards*, at 85.

selection of a useable comparison group. If a particular movement is so unique that there are insufficient comparable movements in the Waybill Sample, we will entertain a reasonably tailored request for comparable movements from the defendant's own traffic tapes." *Id.* at 83.

In this case, for the reasons explained below, the Waybill Sample data available to the parties do not contain sufficient movements that are comparable to the 2011 chlorine issue traffic movements challenged by Canexus here to be used as the basis for a Three-Benchmark test. This is precisely the type of situation in which the STB must permit the parties to use the rail carrier's "own traffic tapes" in selecting a comparison group.

II. **A Fundamental Change to BNSF's Pricing of Chlorine in March 2011 Means That Pre-March 16, 2011 Chlorine Movements in the Waybill Sample Data Are Not Comparable to the Issue Traffic.**

The year 2008 marked the beginning of a sea change in the regulatory environment surrounding the rail transportation of TIH materials. In October 2008, Congress passed the Rail Safety Improvement Act of 2008 ("RSIA"), Pub. L. 110-432 (promulgating 49 U.S.C. § 20157), requiring that all Class I railroads and all intercity passenger and commuter railroads implement a Positive Train Control ("PTC") system by December 31, 2015, on main line track carrying either passengers or at least a specified minimum amount of TIH materials.¹⁰ The PTC system is to be designed to increase railroad safety by overriding the engineer's control of the train in certain situations, automatically stopping the train. Since the enactment of the legislation, the Federal Railroad Administration (FRA) has initiated rulemaking proceedings to develop rules that specify how the PTC system required by Congress will be implemented. Those rules have been modified over the last few years based on comments made by interested parties. Certain

¹⁰ See also 49 C.F.R. § 236.1005 (75 Fed. Reg. 2,700).

aspects of the rules are not yet finalized. The FRA has estimated that it will cost up to \$13.2 billion to install and maintain PTC over the next 20 years.¹¹

In addition to Congress' PTC mandate, starting in 2008 various agencies adopted new regulations relating to safety and security in the transportation of hazardous materials. For example, in late November 2008, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") promulgated routing rules for Rail Sensitive Security Materials ("RSSM") in 49 C.F.R. § 172.820, which, among other things, require railroads to evaluate the routing of hazardous materials, including TIH, based upon 27 specified factors and to select routes that pose the least risk.¹² In late November 2008, the Transportation Security Administration (TSA) also issued new rules requiring a positive chain of custody and control for all RSSM.¹³ For example, the new regulations require that TIH commodities be interchanged only at attended interchange locations where crews from both interline railroads are present and that railroads commit more personnel to monitoring tank car security.¹⁴ In addition, the new regulations require that in high-threat urban areas (HTUAs) designated by the TSA, delivered cars must be

¹¹ Federal Railroad Administration, Department of Transportation, 49 C.F.R. Parts 229, 234, 235, and 236, "Positive Train Control Systems; Final Rule; Request for Comment on Specific Issues," 75 Fed. Reg. 2,598, at 2,684 (Jan. 15, 2010).

¹² 49 C.F.R. § 172.820 (73 Fed. Reg. 20,771 (Apr. 16, 2008) (interim final rule), as amended 73 Fed. Reg. 72,182 (Nov. 26, 2008)).

¹³ See Department of Homeland Security, Transportation Security Administration, 49 C.F.R. §§ 1520 and 1580, "Rail Transportation Security; Final Rule" November 26, 2008; 73 Fed. Reg. 72,173 (Nov. 26, 2008), amended 74 Fed. Reg. 23,657 (May 20, 2009).

¹⁴ 49 C.F.R. § 1580.107.

kept within secure areas.¹⁵ Further, in January 2009 the FRA adopted rules that require, among other things, a 50 mph speed limit for loaded TIH cars.¹⁶

These widespread changes in the regulatory environment regarding transportation of TIH materials have recently had a major impact on the market for transportation of TIH products. Operations relating to TIH movements have become much more complex and costly with the new regulatory requirements. Routing flexibility that BNSF has in transporting non-TIH/PIH products is being restricted. The costs and complexity of building trains and handling yard operations for TIH carloads is increasing. In addition, BNSF is increasingly trying to reflect the impact of liability risk associated with TIH traffic in its rates. Insurance to protect against hazmat-related liability is extremely expensive and difficult to obtain as insurance companies may be unwilling to fully insure the risk, which can amount to several billion dollars for a single incident.¹⁷ Although TIH shipments make up only a small fraction of railroads' overall business, such shipments have been estimated to contribute about 50 percent of the rapidly-rising cost of railroad insurance.¹⁸

¹⁵ *Id.*

¹⁶ 49 C.F.R. § 176.86 (74 Fed. Reg. 1,801, Jan. 13, 2009).

¹⁷ See "Hazmat Transportation by Rail: An Unfair Liability," Assoc. of American Railroads (March 2011), available at <http://www.aar.org/~/media/aar/Background-Papers/Haznat-by-Rail.ashx>; see also "Ex Parte No. 677 (Sub-No.1) Common Carrier Obligation of Railroads-Transportation of Hazardous Materials," BNSF (July 22, 2008), available at <http://www.bnsf.com/media/speeches/pdf/EP677JulyHrgPrestnDr7-21-08.pdf> ("Insurance is not commercially available to sufficiently protect us against catastrophic loss"; "There are limits on the availability of insurance, at ever-increasing cost").

¹⁸ See Chemical Security: The Implementation of the Chemical Facility Anti-Terrorism Standard and the Road Ahead: Hearing Before the Subcomm. on Transportation Security and Infrastructure Protection (2007) (statement of the Assoc. of Amer. Railroads).

As explained by Mr. Garin, in the months leading up to BNSF's March 2011 TIH price changes, BNSF concluded that its pricing of TIH traffic had not properly reflected these fundamental changes in the market, particularly with respect to the pricing of long-haul TIH movements that pose greater risks of liability exposure than short movements and that have been especially affected by the recent changes in the regulatory environment. Garin VS at 2-3. Shippers and, in some instances, connecting carriers were taking advantage of BNSF's out of date pricing structure to move TIH in ways that made no sense, often using circuitous and lengthy routes to take advantage of BNSF's group-to-group pricing structure and obtain relatively low rates on the long-haul movements. *Id.* Therefore, BNSF completely overhauled its pricing of TIH traffic in March 2011. The pricing changes involved movement from group-to-group pricing to point-to-point pricing. It also involved a substantial increase in the level of the rates and pricing of long-haul movements that was more reflective of the disproportionate risks and burdens associated with those movements. *Id.* at 3.

Canexus has acknowledged the fundamental change in BNSF's pricing that occurred in March 2011. As Canexus states in its complaint, "[e]ffective March 16, 2011, BNSF substantially increased its common carrier tariff rates for shipments of chlorine to Glendale, Albuquerque *and other destinations . . .*" Complaint at ¶ 8 (emphasis added). BNSF did not single out Canexus' traffic or the Canexus movements at issue here for special treatment. As acknowledged by Canexus, BNSF's price increases broadly affected TIH movements.

There is no dispute over the fact that BNSF's prices for TIH transportation after March 15, 2011 are substantially different from and higher than BNSF's pre-March 16, 2011 prices and that those price changes are not driven primarily by normal inflationary cost changes. BNSF's post-March 15, 2011 prices reflect the sea change that has occurred in the market for

transportation of TIH products. Therefore, BNSF's post-March 15, 2011 rates and RVC ratios, including those associated with the issue traffic that resulted from the March 2011 price changes, are simply not comparable to BNSF's pre-March 16, 2011 rates and RVC ratios. Thus, pre-March 16, 2011 transportation data will not reflect any movements that are comparable to the current TIH movements, including the issue traffic movements. In these circumstances, a comparison of the issue traffic R/VC ratios to R/VC ratios for TIH traffic prior to BNSF's price change will not demonstrate that the issue traffic movements are making excessive contributions to fixed costs compared to comparable traffic, but will merely reflect that BNSF's TIH pricing underwent a substantial change in March 2011 – a fact that is neither in dispute nor relevant to the rate reasonableness question in a Three-Benchmark case.

As noted previously, the Board has acknowledged the possibility of a regulatory lag problem in comparing current movements to Waybill Sample movements from prior years, but it has suggested that those concerns would not undermine the use of older Waybill Sample data to identify comparable traffic where current price increases are merely the result of inflationary cost increases. The Board's rationale is that where price changes are associated with underlying changes in costs, the R/VC ratios would not be expected to change fundamentally over time just because of a change in price. Price changes would be offset by cost changes recognized by URCS, thus "leaving the R/VC ratios unaffected."¹⁹ But the March 2011 increases in BNSF's rates for transportation of chlorine and other TIH commodities were not based on normal inflationary cost increases; nor were they based on any changes in cost that would be reflected in URCS.

¹⁹ *Simplified Standards*, at 85.

As explained by Mr. Fisher, BNSF's traffic data show that the R/VC ratios for BNSF's long-haul chlorine movements are in fact substantially higher after March 15, 2011 than in the 2009 Waybill Sample data provided to the parties by the Board in this case.²⁰ For chlorine shipments within similar distances of the issue traffic (between 500 miles below the shorter issue traffic movement and 500 miles longer than the longer issue traffic movement, or { } miles), Mr. Fisher shows that the average R/VC ratios associated with BNSF's post-March 15, 2011 local chlorine shipments (for traffic over 180% R/VC) is { } compared to { } for the { } in that distance range in the 2009 Waybill Sample.

Fisher VS at 7. Clearly any comparison of current R/VC ratios on the issue traffic to the R/VC ratios on traffic in the Waybill Sample will provide no meaningful answer to the question whether the issue traffic is being singled out for special treatment as compared to other comparable traffic.

III. **The Waybill Data Do Not Have Sufficient Movements Of Comparable Distance To The Issue Traffic to Construct an Adequate Comparison Group**

As noted previously, the Board has made it clear that distance is an important factor in selecting a comparable traffic group. Length of movement is specifically listed as a factor the STB considers in determining comparability.²¹ Prior cases have recognized that comparable traffic should be drawn from movements of comparable length.²² In every prior Three

²⁰ In *E.I. Dupont De Nemours & Co. v. CSX Transp, Inc.* Docket No. 42099, at 18 (STB served June 30, 2008), the Board suggested that the use of current R/VC ratios in the R/VCcomp benchmark might require an adjustment to the other benchmarks used in the Three-Benchmark analysis. The parties can address this issue in their evidentiary filings.

²¹ *Simplified Standards*, at 17.

²² See e.g., *U.S. Magnesium L.L.C. v. Union Pacific R.R. Co.*, Docket No. 42114 at 5 (STB served Jan. 27, 2010) ("Comparability is determined by reviewing a variety of factors, such as length of movement, commodity type, traffic densities of the likely routes involved, and

Benchmark case, the Board has taken mileage bands into account in determining which of the proffered comparison groups to select for purposes of its Three-Benchmark analysis. Distance traveled is a particularly important factor in determining whether TIH movements are comparable given that many of the risks associated with particular TIH movements and the regulatory requirements that are being increasingly imposed on TIH movements are a function of the distance traveled.

The 2009 Waybill Sample includes very few chlorine movements of comparable distance to the issue traffic movements. In fact, the 2009 Waybill Sample contains only { }²³ transported between { } miles (a mileage band within 500 miles of the issue traffic movements, which is larger than any mileage band previously used in a Three-Benchmark case). Fisher VS at 3-4, 5. Even if the Waybill Sample data were expanded to include the years 2006-2009, the number of local chlorine movements of comparable distance would increase by only { }, a negligible amount. *Id.* at 5.²⁴ In contrast, the post-March 15, 2011 BNSF traffic data include over { } of chlorine that were transported between { } miles. Fisher VS at 7.²⁵

demand elasticity”); *E.I. Dupont De Nemours & Co. v. CSX Transp. Inc.* Docket No. 42099, at 9 (STB served June 30, 2008).

²³ In *U.S. Magnesium L.L.C. v. Union Pacific R.R. Co.* Docket No. 42114, at 2 (STB served Jan. 27, 2010), the Board rejected UP’s comparison group because it relied heavily on rebilled traffic.

²⁴ Currently, only one year of Waybill Sample data may be considered in selecting the comparison group, although a pending proceeding proposes to allow parties to use all four years of Waybill Sample data to form a comparison group. *Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, Ex Parte No. 646 (Sub-No. 3) (served April 2, 2010).

²⁵ Moreover, even if anhydrous ammonia were deemed to be similar enough to chlorine to be part of the comparison group (and BNSF contends that it is not), there would not be a sufficient number of BNSF local anhydrous ammonia movements transported between { }

IV. BNSF's Request To Use 2011 Traffic Is Reasonably Tailored To Address The Circumstances Of This Case.

Given the short deadlines involved in a Three-Benchmark case and the limits on available relief, the Board has a valid concern that the proceedings in a Three-Benchmark case not become unnecessarily complicated. However, the Board has also recognized that the use of a simplified methodology is appropriate only if the procedures "do not result in arbitrary ratemaking."²⁶ Therefore, in *Simplified Standards*, the Board left open the possibility that it would permit supplementation of the Waybill Sample data to ensure the use of a truly comparable traffic group so long as the proposed supplementation was "reasonably tailored."²⁷

BNSF's request to use its current traffic data as a source for comparable movements is reasonably tailored to the circumstances of this case. BNSF proposes to produce to Canexus its available traffic records for the year 2011 through the third quarter for all TIH movements. The universe of TIH movements on BNSF's system in 2011 is relatively small and BNSF will provide costed traffic records along with the inputs used in generating the relevant URCS costs. Moreover, BNSF will be prepared to produce the traffic data promptly, within 3 days of a Board order permitting the use of the 2011 traffic data, so that the schedule for this Three-Benchmark case will not be delayed.

V. Conclusion

For the reasons stated above, the STB should permit the consideration of 2011 TIH movements from BNSF's traffic data in selecting a comparison group.

} miles in the 2009 Waybill Sample – only { } appear in the 2009
Waybill Sample. Fisher VS at 5.

²⁶ *Simplified Standards*, at 4.

²⁷ *Simplified Standards*, at 83.

Respectfully submitted,



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December 14, 2011

Attorneys for BNSF Railway Company

CERTIFICATE OF SERVICE

I hereby certify on this 14th day of December, 2011, I have served a copy of the foregoing BNSF Railway Company's Motion to Permit Consideration of TIH Movements From 2011 BNSF Traffic Data in Selecting Comparison Group on the following by e-mail and first-class mail, postage prepaid:

Thomas W. Wilcox
GKG Law, PC
1054 31st St NW, Suite 200
Washington DC 20007
Counsel for Canexus Chemicals Canada L.P.



Linda S. Stein

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**CANEXUS CHEMICALS
CANADA L.P.**

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant.

STB Docket No. 42132

VERIFIED STATEMENT OF BENTON V. FISHER

I. INTRODUCTION

My name is Benton V. Fisher. I am Senior Managing Director of FTI Consulting, an economic consulting firm, and my office is located at 1101 K Street, N.W., Washington, DC 20005. A statement describing my background, experience, and qualifications is attached hereto as Exhibit BVF-1. I have spent more than 20 years involved in various aspects of transportation consulting, including economic studies of costs and revenues, traffic and operating analyses, and work with costing and financial reporting systems. Much of my work for the railroad industry has required a detailed understanding of the costing approaches and models that are used to evaluate operations and the reasonableness of rates in matters before the Surface Transportation Board ("STB"). I have testified numerous times at the STB regarding rates and URCS costs (Uniform Railroad Costing System, the STB's general purpose costing system) for individual

movements, traffic groups, and entire networks, including challenges to chlorine rates evaluated using the standards adopted by the STB in *Simplified Standards for Rail Rate Cases*.¹ I have extensive experience with the URCS costing methodologies and formulae, as well as with detailed railroad traffic data.

I have been retained by BNSF Railway ("BNSF") to submit this Verified Statement ("VS") to support BNSF's Motion to Permit Consideration of 2011 TIH Movements from BNSF Traffic Data in Selecting Comparison Group in STB Docket No. 42132. This dispute relates to a complaint that Canexus Chemicals Canada ("Canexus") filed November 14, 2011 ("Nov. 2011 Complaint") regarding the reasonableness of rates that BNSF charges for transportation of chlorine from North Vancouver, British Columbia, Canada to two destinations, Glendale, Arizona and Albuquerque, New Mexico. In its complaint, Canexus requests that the rates be evaluated under the "Three-Benchmark approach" set forth in *Simplified Standards*. Under that approach, the parties usually look first to the defendant's historical Carload Waybill Samples ("CWS") to identify a group of comparable movements for which the R/VC_{COMP} benchmark² is to be determined.

In this Verified Statement, I show how few long-haul³ chlorine movements appear in the BNSF Carload Waybill Samples released to the parties in this case. I also show that the current (*i.e.*, post March 15, 2011) R/VC ratios for BNSF's long-haul chlorine shipments are considerably higher than those reflected in the BNSF 2006-2009 Carload Waybill Samples.

¹ STB Ex Parte No. 646 (Sub-No. 1), served September 5, 2007 ("*Simplified Standards*").

² The R/VC_{COMP} represents the average revenue-to-variable-cost (" R/VC ") ratio for the movements in the comparison group.

³ As BNSF identified in Exhibit 1 to its Initial Disclosures filed December 5, 2011, the average loaded length of haul for each of the issue-traffic movements is more than { } miles.

II. THERE ARE VERY FEW RECORDS FOR LONG-HAUL TIH SHIPMENTS IN BNSF's 2006-2009 CARLOAD WAYBILL SAMPLES

A. Each Issue-Traffic Movement is More Than { } Miles

In preparing its Answer, BNSF determined from its traffic files the actual distances that loaded chlorine shipments traveled from North Vancouver to each of Glendale and Albuquerque. For shipments from March 16, 2011 through September 30, 2011, the issue-traffic movements averaged { } miles to Glendale and { } miles to Albuquerque.⁴ These shipments are considerably longer than the issue-traffic movements of chlorine from past Three-Benchmark cases. The Canexus issue movements are two-to-four times as long as the three CSXT lanes in the Three-Benchmark chlorine rate case brought by DuPont, which ranged from 588 to 881 miles.⁵ And the Canexus issue movements are one and one-half times to twice as long as the two UP lanes in the Three-Benchmark chlorine rate case brought by U.S. Magnesium, which were 1,250 and 1,290 miles.⁶

B. Long-Haul TIH Movements in the Carload Waybill Sample

In prior Three-Benchmark cases, the STB adopted comparison groups that were limited to movements that had lengths of haul considered to be comparable to the length of haul of the issue traffic. To incorporate length of haul as a comparability factor, the movements in the comparison group were limited to those that had distances within a specified number of miles of each of the issue-traffic movements. In *DuPont*, the STB adopted separate comparison groups

⁴ In its Initial Disclosure, Canexus identified as the source of its distances the PC*Rail program. The STB has previously adopted mileages that reflect routes that were actually used by the issue traffic in favor of presumed routings. See, e.g., *E.I. DuPont de Nemours v. CSX Transportation*, STB Docket No. 42100, served June 30, 2008 ("*DuPont*"), slip op. at 18, fn 53.

⁵ *DuPont*, slip op. at 1.

⁶ *U.S. Magnesium v. Union Pacific Railroad*, STB Docket No. 42114, served January 28, 2010 ("*U.S. Magnesium*"), slip op. at 3.

for each challenged rate that included shipments that were within 150 miles of the average length of haul for each of the issue-traffic movements.⁷ In *U.S. Magnesium*, the STB adopted comparison groups that included shipments that were within 200 miles of the length of haul for each of the issue-traffic movements.⁸

I identified the number of chlorine movements in the BNSF 2006-2009 Carload Waybill Samples released to the parties in this case that were within 500 miles⁹ of the average length of haul for each issue-traffic movement, which is more than twice as broad as the mileage ranges that have been adopted previously in Three-Benchmark cases involving chlorine. In the 2009 CWS, there were { } local chlorine shipments that were within 500 miles of the average length of haul of the issue-traffic movements to Glendale, and *only* { } for local chlorine shipments within 500 miles of the average length of haul to Albuquerque.¹⁰

In addition to identifying local shipments for which BNSF originates and terminates the traffic – as it does for the issue-traffic movements – the CWS also includes Rule 11 shipments where BNSF bills the customer for a portion of an interline movement, which can be identified by the “Rebill Code” field in the CWS.¹¹ In the 2009 CWS, there were { } Rule 11 chlorine shipments within 500 miles of the Glendale length of haul, and *only* { } for Rule 11 chlorine shipments within 500 miles of the Albuquerque length of haul.

⁷ *DuPont*, slip op. at 8, fn 25.

⁸ *U.S. Magnesium*, slip op. at 6.

⁹ As indicated, this particular distance is selected for the purpose of identifying the low number of records for long-haul chlorine movements in the CWS. It would be pre-mature to suggest that it reflects the distance BNSF would propose for determining the appropriate comparison groups.

¹⁰ To identify the potential universe of records that could be included in the comparison group – before other criteria are applied – I include only CWS records that have an R/VC ratio greater than 180%, and excluded any CWS records for the issue-traffic movements.

¹¹ I include in the CWS record counts only the rebill shipments for which the CWS reports BNSF’s revenues, and not standard interline movements that are billed jointly for which the CWS {

Table 1 below summarizes the number of chlorine shipments from the CWS within 500 miles of the average length of haul for each issue-traffic movement, separately for 2009 and for all four years of CWS records that were released to the parties in this case. As many of the CWS long-haul chlorine shipments are within 500 miles of both destinations, Table 1 also includes the overall total, *i.e.*, all shipments within 500 miles of either destination.

**Table 1:
BNSF CWS Records for Chlorine Shipments
within 500 Miles of the Average Length of Haul
for Each Issue Destination, and Combined;
RVC > 180%, Excluding Issue Traffic**

CWS Source	Glendale ±500 Miles		Albuquerque ±500 Miles		Combined, { } Miles	
	Local	Rebill	Local	Rebill	Local	Rebill
2009	{					}
2006-2009	{					}

Complainants in recent Three-Benchmark cases have argued that shipments of other commodities should be included in the comparison groups used to evaluate and set chlorine rates. I will not address here the issue of whether such non-chlorine shipments should be considered comparable. For purposes of BNSF's motion, I identified the corresponding number of CWS records for other toxic-by-inhalation ("TIH") commodities of distances within 500 miles of the average length of haul for each issue-traffic destination in Table 2 below.¹²

¹² {

**Table 2:
BNSF CWS Records for Non-Chlorine TIH Shipments
within 500 Miles of the Average Length of Haul
for Each Issue Destination, and Combined; R/VC > 180%**

CWS Source	Glendale ±500 Miles		Albuquerque ±500 Miles		Combined, { } Miles	
	Local	Rebill	Local	Rebill	Local	Rebill
2009	{					}
2006-2009	{					}

III. BNSF's CURRENT R/VC RATIOS FOR LONG-HAUL CHLORINE SHIPMENTS ARE SIGNIFICANTLY HIGHER THAN THOSE FOR SUCH MOVEMENTS INCLUDED IN THE 2006-2009 CARLOAD WAYBILL SAMPLES

A. BNSF's Current R/VC Ratios for Long-Haul Chlorine Movements Exceed { }

In its complaint, Canexus claimed that “Effective March 16, 2011, BNSF substantially increased its common carrier tariff rates for shipments of chlorine to Glendale, Albuquerque, and other destinations in BNSF Price Authority 90096.”¹³ Based on records from BNSF's traffic files for TIH shipments from March 16-September 30, 2011, I determined which chlorine shipments had a loaded length of haul within 500 miles of either of the issue-traffic movements, *i.e.*, reported loaded distances between { } miles, and determined the other movements inputs that are necessary to calculate URCS variable costs for each shipment (*e.g.*, car type, lading weight). I then calculated the URCS costs for each of these shipments based on the BNSF 2010 URCS unit cost files recently released by the STB.¹⁴ I followed standard indexing procedures to bring the base-year 2010 results to the appropriate quarter in 2011, and calculated the R/VC ratio for each shipment. Based on this analysis, I determined that from March 16, 2011 through September 30, 2011, there were { } BNSF local chlorine carloads

¹³ Nov. 2011 Complaint at 5.

¹⁴ <http://www.stb.dot.gov/stb/industry/urcs.html>

that moved at R/VC ratios greater than 180%, and they had an average R/VC ratio of { }. I also determined that there were { } interline¹⁵ chlorine carloads for which the R/VC ratio for the BNSF portion was greater than 180%, and they had an average R/VC ratio of { }. Table 3 below presents the post-March 15, 2011 total carloads and average R/VC ratios separately for chlorine shipments with lengths of haul within 500 miles of each destination, and also the overall results for all shipments within 500 miles of either destination.

**Table 3:
Total Carloads and Average R/VC Ratios for
BNSF Post-March 15, 2011 Chlorine Shipments
within 500 Miles of the Average Length of Haul
for Each Issue Destination, and Combined;
R/VC > 180%, Excluding Issue Traffic**

CWS Source	Glendale ±500 Miles		Albuquerque ±500 Miles		Combined, { } Miles	
	Local	Interline	Local	Interline	Local	Interline
Total Carloads	{					}
Average R/VC	{					}

B. BNSF's R/VC Ratios for Long-Haul Chlorine Movements from Historical Carload Waybill Samples are Less Than { }

I also determined the average R/VC ratios for the CWS chlorine shipments with distances within 500 miles of the issue-traffic movements, and present the results for the corresponding destinations and CWS periods, separately for local and rebilled shipments, corresponding to the CWS record counts summarized in Table 1 above.

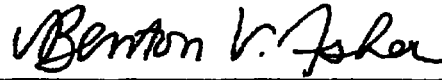
¹⁵ { } the records from BNSF's traffic files identified BNSF's share of the revenues for all interline movements, not just Rule 11 shipments, which permitted the calculation of an R/VC ratio for only BNSF's portion of the through movement. { }

Table 4:
Average R/VC Ratios for
BNSF CWS Records for Chlorine Shipments
within 500 Miles of the Average Length of Haul
for Each Issue Destination, and Combined;
R/VC > 180%, Excluding Issue Traffic

CWS Source	Glendale ±500 Miles		Albuquerque ±500 Miles		Combined, { } Miles	
	Local	Rebill	Local	Rebill	Local	Rebill
2009	{					}
2006-2009	{					}

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on December 14, 2011

A handwritten signature in black ink, reading "Benton V. Fisher". The signature is written in a cursive style with a large initial "B".

Benton V. Fisher

Benton V. Fisher

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Education

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Benton V. Fisher is a Senior Managing Director of FTI's Economic Consulting group, located in Washington, D.C. Mr. Fisher has more than 20 years of experience in providing financial, economic and analytical consulting services to corporate clients dealing with transportation, telecommunications, and postal subjects.

North America's largest railroads have retained FTI both to assist them in making strategic and tactical decisions and to provide expert testimony in litigation. FTI's ability to present a thorough understanding of myriad competitive and regulatory factors has given its clients the necessary tools to implement and advance their business. Mr. Fisher has worked extensively to develop these clients' applications for mergers and acquisitions and expert testimony justifying the reasonableness of their rates before the Surface Transportation Board. In addition to analyzing extensive financial and operating data, Mr. Fisher has worked closely with people within many departments at the railroad as well as outside counsel to ensure that the railroads' presentations are accurate and defensible. Additionally, Mr. Fisher reviews the expert testimony of the railroads' opponents in these proceedings, and advises counsel on the necessary course of action to respond.

AT&T and MCI retained FTI to advance its efforts to implement the Telecommunications Act of 1996 in local exchange markets. Mr. Fisher was primarily responsible for reviewing the incumbent local exchange carriers' (ILEC) cost studies, which significantly impacted the ability of FTI's clients to access local markets. Mr. Fisher analyzed the sensitivity of multiple economic components and incorporated this information into various models being relied upon by the parties and regulators to determine the pricing of services. Mr. Fisher was also responsible for preparing testimony that critiqued alternative presentations.

Mr. Fisher assisted in reviewing the U.S. Postal Service's evidence and preparing expert testimony on behalf of interveners in Postal Rate and Fee Changes cases. He has also been retained by a large international consulting firm to provide statistical and econometric support in their preparation of a long-range implementation plan for improving telecommunications infrastructure in a European country.

Mr. Fisher has sponsored expert testimony in rate reasonableness proceedings before the Surface Transportation Board and in contract disputes in Federal Court and arbitration proceedings.

Mr. Fisher holds a B.S. in Engineering and Management Systems from Princeton University.

Benton V. Fisher

TESTIMONY

Surface Transportation Board

January 15, 1999	Docket No. 42022 FMC Corporation and FMC Wyoming Corporation v. Union Pacific Railroad Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher
March 31, 1999	Docket No. 42022 FMC Corporation and FMC Wyoming Corporation v. Union Pacific Railroad Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher
April 30, 1999	Docket No. 42022 FMC Corporation and FMC Wyoming Corporation v. Union Pacific Railroad Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher
July 15, 1999	Docket No. 42038 Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher
August 30, 1999	Docket No. 42038 Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher
September 28, 1999	Docket No. 42038 Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher
June 15, 2000	Docket No. 42051 Wisconsin Power and Light Company v. Union Pacific Railroad Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher
August 14, 2000	Docket No. 42051 Wisconsin Power and Light Company v. Union Pacific Railroad Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher
September 28, 2000	Docket No. 42051 Wisconsin Power and Light Company v. Union Pacific Railroad Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher
December 14, 2000	Docket No. 42054 PPL Montana, LLC v. The Burlington Northern Santa Fe Railway Company, Opening Verified Statement of Christopher D. Kent and Benton V. Fisher
March 13, 2001	Docket No. 42054 PPL Montana, LLC v. The Burlington Northern Santa Fe Railway Company, Reply Verified Statement of Christopher D. Kent and Benton V. Fisher
May 7, 2001	Docket No. 42054 PPL Montana, LLC v. The Burlington Northern Santa Fe Railway Company, Rebuttal Verified Statement of Christopher D. Kent and Benton V. Fisher

Benton V. Fisher

October 15, 2001	Docket No. 42056 Texas Municipal Power Agency v. The Burlington Northern Santa Fe Railway Company, Opening Verified Statement of Benton V. Fisher
January 15, 2002	Docket No. 42056 Texas Municipal Power Agency v. The Burlington Northern Santa Fe Railway Company, Reply Verified Statement of Benton V. Fisher
February 25, 2002	Docket No. 42056 Texas Municipal Power Agency v. The Burlington Northern Santa Fe Railway Company, Rebuttal Verified Statement of Benton V. Fisher
May 24, 2002	Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company, Opening Evidence and Argument of Norfolk Southern Railway Company
June 10, 2002	Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Opening Evidence and Argument of Norfolk Southern Railway Company
July 19, 2002	Northern States Power Company Minnesota v. Union Pacific Railroad Company, Union Pacific's Opening Evidence
September 30, 2002	Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company, Reply Evidence and Argument of Norfolk Southern Railway Company
October 4, 2002	Northern States Power Company Minnesota v. Union Pacific Railroad Company, Union Pacific's Reply Evidence
October 11, 2002	Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Reply Evidence and Argument of Norfolk Southern Railway Company
November 1, 2002	Northern States Power Company Minnesota v. Union Pacific Railroad Company, Union Pacific's Rebuttal Evidence
November 19, 2002	Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company, Rebuttal Evidence and Argument of Norfolk Southern Railway Company
November 27, 2002	Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Rebuttal Evidence and Argument of Norfolk Southern Railway Company
January 10, 2003	Docket No. 42057 Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, Opening Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
February 7, 2003	Docket No. 42058 Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Opening Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad

Benton V. Fisher

April 4, 2003	Docket No. 42057 Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, Reply Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
May 19, 2003	Docket No. 42057 Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, Rebuttal Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
May 27, 2003	Docket No. 42058 Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Joint Variable Cost Reply Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad
May 27, 2003	Docket No. 42058 Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Reply Evidence of The Burlington Northern and Santa Fe Railway Company
June 13, 2003	Docket No. 42071 Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, Opening Evidence of The Burlington Northern and Santa Fe Railway Company
July 3, 2003	Docket No. 42058 Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Joint Variable Cost Rebuttal Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad
October 8, 2003	Docket No. 42071 Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, Reply Evidence of The Burlington Northern and Santa Fe Railway Company
October 24, 2003	Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company Supplemental Evidence of Norfolk Southern Railway Company
October 31, 2003	STB Docket No. 42069 Duke Energy Corporation v. Norfolk Southern Railway Company, Reply of Norfolk Southern Railway Company to Duke Energy Company's Supplemental Evidence
November 24, 2003	STB Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Supplemental Evidence of Norfolk Southern Railway Company
December 2, 2003	STB Docket No. 42072 Carolina Power & Light Company v. Norfolk Southern Railway Company, Reply of Norfolk Southern Railway Company to Carolina Power & Light Company's Supplemental Evidence
January 26, 2004	STB Docket No. 42058 Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, Joint Supplemental Reply Evidence and Argument of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company

Benton V. Fisher

March 1, 2004	STB Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company, Opening Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
March 22, 2004	STB Docket No. 42071 Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, Supplemental Reply Evidence of The Burlington Northern and Santa Fe Railway Company
April 29, 2004	STB Docket No. 42071 Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, Rebuttal Evidence of The Burlington Northern and Santa Fe Railway Company
May 24, 2004	STB Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company, Reply Evidence of The Burlington Northern and Santa Fe Railway Company
March 1, 2005	Docket No. 42071 Otter Tail Power Company v. BNSF Railway Company, Supplemental Evidence of BNSF Railway Company
April 4, 2005	Docket No. 42071 Otter Tail Power Company v BNSF Railway Company, Reply of BNSF Railway Company to Supplemental Evidence
April 19, 2005	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Opening Evidence of BNSF Railway Company
July 20, 2005	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Reply Evidence of BNSF Railway Company
July 27, 2004	STB Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company, Rebuttal Evidence of The Burlington Northern and Santa Fe Railway Company
September 30, 2005	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Rebuttal Evidence of BNSF Railway Company
October 20, 2005	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Surrebuttal Evidence of BNSF Railway Company
June 15, 2006	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company
June 15, 2006	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company
March 19, 2007	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Reply Third Supplemental Evidence of BNSF Railway Company

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March 26, 2007	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Reply Second Supplemental Evidence of BNSF Railway Company
July 30, 2007	Docket No. 42095 Kansas City Power & Light v. Union Pacific Railroad Company, Union Pacific's Opening Evidence
August 20, 2007	Docket No. 42095 Kansas City Power & Light v. Union Pacific Railroad Company, Union Pacific's Reply Evidence
February 4, 2008	Docket No. 42099 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSXT
February 4, 2008	Docket No. 42100 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSXT
February 4, 2008	Docket No. 42101 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSXT
March 5, 2008	Docket No. 42099 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Reply Evidence of CSXT
March 5, 2008	Docket No. 42100 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Reply Evidence of CSXT
March 5, 2008	Docket No. 42101 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Reply Evidence of CSXT
April 4, 2008	Docket No. 42099 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Rebuttal Evidence of CSXT
April 4, 2008	Docket No. 42100 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Rebuttal Evidence of CSXT
April 4, 2008	Docket No. 42101 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Rebuttal Evidence of CSXT
July 14, 2008	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Third Supplemental Reply Evidence of BNSF Railway Company
August 8, 2008	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Fourth Supplemental Evidence of BNSF Railway Company
September 5, 2008	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Fourth Supplemental Reply Evidence of BNSF Railway Company
October 17, 2008	Docket No. 42110 Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc., CSX Transportation, Inc.'s Reply to Petition for Injunctive Relief, Verified Statement of Benton V. Fisher
August 24, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Opening Evidence of Union Pacific Railroad Company

Benton V. Fisher

September 22, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
October 22, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Rebuttal Evidence of Union Pacific Railroad Company
January 19, 2010	Docket No. 42110 Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
May 7, 2010	Docket No. 42113 Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company, Joint Reply Evidence of BNSF Railway Company and Union Pacific Railroad Company
October 1, 2010	Docket No. 42121 Total Petrochemicals USA, Inc. v. CSX Transportation, Inc., Motion for Expedited Determination of Jurisdiction Over Challenged Rates, Verified Statement of Benton V. Fisher
November 22, 2010	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Comments of BNSF Railway Company on Remand, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
January 6, 2011	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition for Enforcement of Decision, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
July 5, 2011	Docket No. 42123 M&G Polymers USA, LLC v. CSX Transportation, Inc., Reply Market Dominance Evidence of CSX Transportation, Inc.
August 1, 2011	Docket No. 42125 E.I. DuPont De Nemours and Company v. Norfolk Southern Railway Company, Norfolk Southern Railway's Reply to Second Motion to Compel, Joint Verified Statement of Benton V. Fisher and Michael Matelis
August 5, 2011	Docket No. 42121 Total Petrochemicals USA, Inc. v. CSX Transportation, Inc., Reply Market Dominance Evidence of CSX Transportation, Inc.
August 15, 2011	Docket No. 42124 State of Montana v. BNSF Railway Company, BNSF Railway Company's Reply Evidence and Argument, Verified Statement of Benton V. Fisher
October 24, 2011	Docket No. 42120 Cargill, Inc. v. BNSF Railway Company, BNSF Railway Company's Reply Evidence and Argument, Verified Statement of Benton V. Fisher
October 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Opening Evidence of BNSF Railway Company, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 10, 2011	Docket No. 42127 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company

Benton V. Fisher

U.S. District Court for the Eastern District of North Carolina

March 17, 2006 Civil Action No. 4:05-CV-55-D, PCS Phosphate Company v. Norfolk Southern Corporation and Norfolk Southern Railway Company, Report by Benton V. Fisher

U.S. District Court for the Eastern District of California

January 18, 2010 E.D. Cal. Case No. 08-CV-1086-AWI, BNSF Railway Company v. San Joaquin Valley Railroad Co., et al.

Arbitrations and Mediations

July 10, 2009 JAMS Ref. # 1220039135; In the Matter of the Arbitration Between Pacer International, Inc., d/b/a/ Pacer Stacktrain (f/k/a/ APL Land Transport Services, Inc.), American President Lines, Ltd. And APL Co. Pte. Ltd. And Union Pacific Railroad Company; Rebuttal Expert Report of Benton V. Fisher

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**CANEXUS CHEMICALS
CANADA L.P.**

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant.

STB Docket No. 42132

**VERIFIED STATEMENT OF
DAVID L. GARIN**

My name is David L. Garin. I am Group Vice President, Marketing – Industrial Products of BNSF Railway Company ("BNSF"). I have been at BNSF and its predecessor since 1983 and have been in my current position since 1999. In addition to my current position, I have held a variety of leadership positions at BNSF in the areas of Audit, Corporate Accounting, Financial Reporting, and Strategic Planning.

In my current position, I am responsible for BNSF's sales, marketing, customer service and economic development for transportation of commodities in BNSF's Industrial Products ("IP") group. The commodities covered by BNSF's Industrial Products group range from chemicals and petroleum products to lumber, minerals, metals, food and beverage products, machinery and household goods. The products I am responsible for marketing include chlorine and other Toxic by Inhalation Hazard ("TIH") as well as Poison by Inhalation Hazard ("PIH") materials.

I am submitting this verified statement to explain to the Board why the IP group made a fundamental change to our pricing of chlorine and other TIH commodities effective March 16, 2011. On June 15, 2011, I submitted a verified statement in another proceeding (Docket No. FD-35524) filed by Canexus regarding the interchange location for certain long-haul interline movements of Canexus's chlorine traffic. In that June 2011 verified statement, I discussed some of BNSF's recent changes to BNSF's approach to pricing TIH/PIH commodities.

The IP group markets the transportation of more than 20 TIH products, including chlorine. Chlorine movements make-up approximately 50% of the volume of TIH traffic marketed by our group. My group is not responsible for the marketing of Anhydrous Ammonia, another TIH product. BNSF considers Anhydrous Ammonia, which is used as a fertilizer, to be an agricultural commodity rather than an Industrial Products commodity so transportation of Anhydrous Ammonia historically has been marketed by (and continues to be marketed by) BNSF's Agricultural Products group.

My group made a comprehensive overhaul of our pricing of the transportation of chlorine and other TIH products that resulted in a substantial increase in the rates we assessed for such transportation, particularly for long-haul movements, effective March 16, 2011. Several factors led our group to make this fundamental change to our pricing. Among other things, it became apparent that we had been charging below market rates for the transportation of TIH materials, especially for long-haul movements. This became apparent in part from our receipt of shipper requests for transportation of TIH materials over very long, circuitous routes under our previous group-to-group pricing structure. For example, one BNSF chlorine rate was so below market that it resulted in chlorine shippers tendering traffic to BNSF even though under that rate the chlorine shipments moved more than 1,500 miles in a highly circuitous routing that went through

five High Threat Urban Areas ("HTUA") as defined by the Transportation Safety Administration and even though the chlorine shippers had multiple other rail options under which the chlorine shipments would have moved a much shorter distance (between 500 and 1,000 miles) and through only two HTUAs.

As I explained in my previous June 15, 2011 verified statement in FD 35524, our pre-March 2011 group-to-group pricing structure facilitated these inappropriate routings. Under group-to-group pricing, BNSF would provide service for any shipper to destinations or interchange locations within broad geographic regions, rather than to particular freight stations. The specific destination or interchange location within the area was not specified in the pricing authority. We realized that connecting carriers could take advantage of these group-to-group rates, which were not limited to particular stations or types of service, by arranging with a shipper to specify a group location as an interchange and obtaining the short haul on TIH movements.

In our March 2011 change to BNSF's pricing structure for TIH commodities, the IP group attempted to eliminate these requests for circuitous routing and to bring our below market rates into line with market rates. We did this by changing from the group-to-group pricing structure to a point-to-point pricing structure and by establishing generally higher rates for movements between specified freight stations. Since market indicators were that the longer-haul TIH movements had been priced farther below market than the short-haul movements, we adopted proportionally higher rate increases for long-haul chlorine and other TIH movements than for short-haul movements.

We also decided that it was appropriate to increase our rates for transporting chlorine and other TIH materials due to the increasing operational complexity and associated costs resulting

from recent legislation and regulations that required special handling of TIH/PIH movements. Many of the new and burdensome operating requirements have a particularly large impact on long-haul movements. The new regulations included a rule providing that TIH commodities could only be interchanged at attended interchange locations where crews from both interline railroads are present, a recent regulation that set a 50 mph speed limit for loaded TIH cars, and routing protocols overseen by the Federal Railroad Administration and the Pipeline and Hazardous Materials Safety Administration.

Another factor underlying our increase in prices for transporting chlorine and other TIH materials in March 2011 was our realization that a high percentage of the cost of BNSF's very expensive liability insurance was attributable to BNSF's handling of dangerous TIH movements even though such movements constitute only a very small percentage of our overall traffic. As a general matter, our liability exposure increases with length of haul, thus justifying a somewhat larger increase in rates for long-haul movements. There is no Price Anderson type protection covering the transportation of TIH commodities.

I am aware of some shippers' claims that railroads are increasing rates on TIH commodities in an effort to discourage shippers from seeking to transport those commodities. BNSF's price change on chlorine and other TIH traffic in March 2011 was not intended to "demarket" this traffic. Rather we increased our rates for these TIH products for the business reasons specified above. The fact that considerable TIH traffic has continued to move on BNSF after the March 2011 price increase indicates that our March 2011 tariff adjustments did not foreclose the movement of this traffic.

VERIFICATION

I, David L. Garin, declare under penalty of perjury, that the foregoing statement is true and correct and that I am qualified and authorized to file this statement.

A handwritten signature in black ink, appearing to read "D. L. Garin", written in a cursive style.

Executed: December 14, 2011

David L. Garin